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Wong Kar Juat & Anor v S7 Auto Parts (M) Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-181–01 OF 2013
ROHANA YUSUF, IDRUS HARUN AND PRASAD ABRAHAM JJCA
9 SEPTEMBER 2015

C *Employment Law — Employee's duties — Breach of duties — Respondent employed appellants as sale manager — Appellants responsible for managing respondent's business — Director of respondent discovered discrepancies in respondent's account — Whether there was breach of fiduciary duty by appellants — Whether appellants responsible for alleged discrepancies — Whether*
D *appellants liable to pay unaccounted sum to respondent*

The respondent was in the business of trading in used engines and spare parts imported from Japan whereas the appellants were the sales managers of the respondent. Problem arose when the director of the respondent ('PW6')
E discovered that there were discrepancies in the respondent's account. The respondent appointed one accountant firm to conduct an assessment exercise on the financial status of the respondent and found that a sum of RM1,237,555 was not accounted for in cash and in kind. The respondent brought an action against the appellants at the High Court for the said
F unaccounted sum. The respondent alleged that, the appellants being the persons managing the respondent's business had committed a breach of fiduciary duty to the respondent and breach of trust and confidence as well as fraud which had caused it to suffer losses. The appellants on the other hand had denied the said allegations and submitted that PW6 and his wife had full
G control over the business directions and activities and financial matters of the respondent. At the end of the trial, the trial court allowed the respondent's claim, hence this appeal. The issues for consideration were: (a) whether the appellants were liable to pay the sum of RM661,566 to the respondent being the amount for the cash sales of the goods belonging to the respondent;
H (b) whether the appellants were liable to pay the respondent the sum of RM335,700 being the value of the 746 missing used engines belonging to the respondent; (c) whether the appellants were liable to pay RM130,400 being the amount not remitted to the respondent for the sales of catalytic converters; and (d) whether the appellants had breached their fiduciary duty which the
I appellants were said to have owed the respondent.

Held, allowing the appeal and setting aside the order of the learned judicial commissioner with costs of RM15,000:

(1) The respondent bore the legal burden of establishing the facts pleaded against the appellants under s 101 of the Evidence Act 1950 ('the Act') in order to succeed in its claims against the appellants (see para 18).

(2) PW5, the group accounts manager of Sungei Sendok Holdings Sdn Bhd (the respondent holding company) had never explained on how did she arrive at the figure of RM661,566. Thus, PW5's evidence without more would not suffice in order to prove the respondent's case against the appellants. Further, there were no other witnesses called to testify including the accounts assistant of the respondent, other employees who were involved in sales and collection of the proceeds of such sales and also the customers that could lend credence to PW5's testimony. On balance of probabilities, the respondent had failed to prove that the appellants were responsible for causing the loss of the sum of RM661,566 or had misappropriated for or converted the said sum to their own use (see paras 20–21 & 24–25).

(3) The evidence of the purchaser of the catalytic converters ('PW2') showed that PW6 and one Wong Kok Keong were the two major players directing the sales of catalytic converters belonging to the respondent, not the appellants. The respondent could not prove that it was the appellants who wrongfully took the money. The court concluded that the learned judicial commissioner had fallen into error in misapprehending the law and the evidence in ordering the appellants to pay RM130,400 to the respondent (see para 29).

(4) With regard to the missing used engines, only the accounts executive of Sungei Sendok Holdings Sdn Bhd ('PW3') and PW5 from the stocktaking team testified, nevertheless, they were not the respondent's employees and did not have direct knowledge of the 746 missing used engines. Further, none of the respondent's employees was called to testify on the existence of the said engines. The failure of the respondent to call these material witnesses would attract the presumption of adverse inference under s 114(g) of the Act against it (see paras 40 & 43).

(5) The evidence adduced by the respondent did not point to dissipation of the 746 used engines by the appellants. There was no contemporaneous documents and oral evidence which showed that it was the appellants who took or were entrusted with these engines for their own or third party's use and benefit (see para 46).

(6) The learned judicial commissioner had correctly found that the appellants owed a fiduciary duty to the respondent. However, the court found that the finding of liability by His Lordship could not be countenanced as it was against the weight of evidence. The alleged breach was clearly related to the missing money and assets of the respondent that was the 746 used engines. The respondent had failed to prove that the appellants were liable in the sense it was pleaded in the statement of claim. Thus, the respondent had failed to establish that the appellants had breached their fiduciary duty to the respondent (see para 48).

[Bahasa Malaysia summary

Responden menjalankan perniagaan perdagangan enjin dan bahan gantian terpakai yang diimport dari Jepun manakala perayu-perayu adalah pengurus jualan responden. Masalah timbul apabila pengarah responden ('PW6') menyedari bahawa terdapat kepincangan dalam akaun responden. Responden melantik seorang akauntan firma untuk menjalankan langkah taksiran terhadap status kewangan responden dan mendapati bahawa jumlah RM1,237,555 tidak dapat dikesan secara tunai dan seperti itu juga. Responden memulakan tindakan ini terhadap perayu-perayu di Mahkamah Tinggi bagi jumlah yang tidak dapat dikesan tersebut. Responden mendakwa bahawa perayu-perayu, sebagai orang yang menguruskan perniagaan responden telah melakukan kewajipan fidusiarinya dan pelanggaran amanah dan kepercayaan serta penipuan yang menyebabkannya mengalami kerugian. Perayu-perayu, sebaliknya, menafikan dakwaan-dakwaan tersebut dan menghujahkan bahawa PW6 dan isterinya mempunyai kawalan penuh atas arah tuju perniagaan dan aktiviti dan juga hal-hal kewangan responden. Pada penutup perbicaraan, mahkamah bicara membenarkan tuntutan responden. Oleh itu, timbul rayuan ini. Isu-isu yang peru dipertimbangkan adalah: (a) sama ada perayu-perayu bertanggungan membayar jumlah RM661,566 kepada responden iaitu jumlah jualan tunai bagi barang-barang milik responden; (b) sama ada perayu-perayu bertanggungan membayar kepada responden jumlah RM335,700 iaitu nilai 746 enjin terpakai milik responden yang hilang; (c) sama ada perayu-perayu bertanggung membayar RM130,400 iaitu jumlah yang tidak dikembalikan kepada responden bagi jualan penukar pemangkin; dan (d) sama ada perayu-perayu telah melanggar kewajipan fidusiari mereka yang dikatakan perayu-perayu ada pada responden.

Diputuskan, membenarkan rayuan dan mengetepikan perintah pesuruhjaya kehakiman dengan kos sebanyak RM15,000:

(1) Responden mempunyai beban undang-undang untuk membuktikan fakta-fakta yang diplidkan terhadap perayu-perayu di bawah s 101 Akta Keterangan 1950 ('Akta') untuk berjaya dalam tuntutannya terhadap perayu-perayu (lihat perenggan 18).

(2) PW5, Pengurus Akaun Kumpulan Sungei Sendok Holdings Sdn Bhd (syarikat pegangan responden) tidak menerangkan bagaimana dia mencapai jumlah RM661,566. Oleh itu, keterangan PW5, tanpa lebih, tidak cukup untuk membuktikan kes responden terhadap perayu-perayu. Tambahan lagi, tiada saksi-saksi lain yang dipanggil untuk memberi keterangan termasuk pembantu akaun responden, lain-lain pekerja yang terlibat dalam jualan dan kutipan jumlah jualan dan juga pelanggan-pelanggan yang menyokong keterangan PW5. Atas imbangan kebarangkalian, responden gagal membuktikan bahawa perayu-perayu bertanggungjawab menyebabkan kerugian jumlah RM661,566 atau penyelewengan jumlah tersebut untuk kegunaan mereka (lihat perenggan 20–21 & 24–25).

(3) Keterangan pembeli penukar pemangkin ('PW2') menunjukkan bahawa PW6 dan seorang yang bernama Wong Kok Keong adalah dua orang utama yang memainkan peranan dalam arah tuju jualan penukar pemangkin milik responden, bukan perayu-perayu. Responden tidak berjaya membuktikan bahawa perayu-perayu yang mengambil wang tersebut secara salah. Mahkamah menyimpulkan bahawa pesuruhjaya kehakiman terkhilaf apabila tersalah tafsir undang-undang dan keterangan dalam memerintahkan perayu-perayu membayar RM130,400 kepada responden (lihat perenggan 29).

(4) Berkenaan enjin-enjin terpakai yang hilang, hanya eksekutif akaun Sungei Sendok Holding Sdn Bhd ('PW3') dan PW5 daripada kumpulan pengambilan stok memberi keterangan tetapi mereka bukan pekerja-pekerja responden dan tidak mempunyai pengetahuan secara langsung tentang 746 enjin terpakai yang hilang. Selanjutnya, pekerja-pekerja responden tidak dipanggil memberi keterangan tentang enjin-enjin yang hilang itu. Kegagalan responden memanggil saksi-saksi material ini membangkitkan anggapan inferens bertentangan di bawah s 114(g) Akta terhadapnya (lihat perenggan 40 & 43).

(5) Keterangan yang dikemukakan oleh responden tidak menunjuk pada kehilangan 746 enjin terpakai oleh perayu-perayu. Tiada keterangan dokumentar dan lisan semasa yang menunjukkan bahawa perayu-perayu yang mengambil atau diamanahkan dengan enjin-enjin tersebut bagi kegunaan atau faedahnya sendiri atau pihak ketiga (lihat perenggan 46).

(6) Persuruhjaya kehakiman telah, dengan betul, memutuskan bahawa perayu-perayu mempunyai kewajipan fidusiari terhadap responden. Walau bagaimanapun, mahkamah mendapati bahawa dapatan liabiliti oleh beliau tidak boleh dipersetujui kerana bertentangan dengan berat keterangan. Pelanggaran yang didakwa jelas berkaitan dengan wang dan aset responden yang hilang iaitu 746 enjin terpakai. Responden gagal

membuktikan bahawa perayu-perayu bertanggungan kerana ini diplidkan dalam penyata tuntutan. Oleh itu, responden gagal membuktikan bahawa perayu-perayu melanggar kewajipan fidusiarinya kepada responden (lihat perenggan 48).]

Notes

For a case on breach of duties, see 6(3) *Mallal's Digest* (5th Ed, 2015) para 2520.

Cases referred to

Attorney General v Blake (Jonathan Cape Ltd Third Party) [2001] 1 AC 268, HL (refd)
Beeches Workingmen's Club and Institute Trustees v Scott [1969] 2 All ER 420, CA (refd)
Bristol and West Building Society v Mothew [1998] Ch 1, CA (refd)
Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Chee Kon Fatt [1991] 3 CLJ 2564, HC (refd)
Seneviratne v R [1936] 3 All ER 36, PC (refd)
Union Transport Finance Ltd v British Car Auctions Ltd [1978] 2 All ER 385, CA (refd)

Legislation referred to

Evidence Act 1950 ss 101, 114, 114(g)

Appeal from: Civil Suit No 22NCVC-1026–09 of 2011 (High Court, Shah Alam)

HC Tan (HC Tan & Zahani) for the appellant.
Avinder Singh Gill (AS Gill & Salina) for the respondent.

Idrus Harun JCA:

INTRODUCTION

[1] The appeal in the present instance had been brought by the appellant in light of the High Court decision in allowing the respondent's claim against the appellant. We heard both counsel for the appellant and the respondent and accordingly at the conclusion of the arguments, dismissed the appeal.

THE SUIT

[2] Before we embark upon a consideration of the merits of, and the reasons

for allowing, the appeal, it would be desirable to lay down some of the material facts in this suit. The respondent was a company, which at the material time was in the business of trading in used engines and spare parts imported from Japan. It was incorporated on 13 May 2009. One Gwee Bok Wee ('PW6') and his wife Lau Kiat Hoon were the shareholders and directors of the respondent. The respondent in fact, was part of a larger group of companies under the control of the holding company known as Sungei Sendok Holdings Sdn Bhd. This group of 30 companies in total was led by PW6 who was the group managing director and a director in each of these companies as a representative of the holding company.

[3] In May 2009, the respondent appointed the appellants as its sales managers and each was paid a monthly salary of RM7,000. The statement of claim revealed that the appellants were fully responsible in managing the respondent's business and the respondent allowed its business operations to be run entirely by the appellants. The respondent had 18 employees including the appellants.

[4] It was the respondent's pleaded case that the appellants were promised a share in the business so long as they performed and showed that they were capable of bringing profits to the respondent. All the investments into the respondent company would come from PW6.

[5] From their position as employees and persons in charge of the day to day management, operations and administration of the respondent, it was further pleaded that the appellants owed fiduciary duties to the respondent. Such duties were said to arise as the appellants were required:

(a) at all times to act bona fide, honestly and in good faith;

(b) not to make a secret profit based on the trust placed upon them by the respondent;

(c) not to place themselves in a position where their personal interest would be in conflict with that of their responsibilities; and

(d) not to act in a manner that would benefit them or third party and would adversely affect the respondent's position or to act for the benefit of the third party without knowledge or prior consent of the respondent.

[6] As events turned out,it was alleged that the appellants had committed a breach of fiduciary duty to the respondent and a breach of trust and confidence as well as fraud which according to the respondent, had caused it to suffer losses. It becomes apparent from the statement of claim that these allegations of breaches by the appellants began with the discovery sometime in late March

2011 by the respondent through PW6 that there were discrepancies in the respondent's account. It was discovered that several transactions concerning sales of goods to a third party could not be accounted for because payments that ought to have been received by the respondent, were not received. The respondent in consequence, appointed one accountant firm to conduct an assessment exercise on the financial status of the respondent. It was found that a sum of RM1,237,555 was not accounted for in cash and in kind. Subsequently on 18 May 2011, PW6 suspended the appellants for their alleged unlawful acts and the respondent's employees and took over the management of the respondent. He thereupon ordered an investigation to be carried out with respect to the sales of the respondent's goods and proceeds from such sales, and a stocktaking of the used engines to be performed. The investigation that followed disclosed that:

(a) several transactions involving sales of goods belonging to the respondent where payments had been received amounting to RM661,566 were not accounted for;

(b) several transactions had been carried out without the knowledge and consent of the respondent in respect of which its customers were given credit terms however payments from them amounting to RM224,373 were not accounted to the respondent; and

(c) there were 746 used engines worth RM335,700 belonging to the respondent that were missing from the respondent's yard.

It was also pleaded that every customer the respondent had contacted had informed that they had already made payments to the appellants.

[7] Thus, the first platform upon which the respondent founded its claims was premised on its allegation that the appellants had breached their obligations by committing acts of swindling the unaccounted sums and loss of the 746 used engines, various wrongful acts of selling the goods, transferring, diverting, misappropriating money belonging to the respondent, concealing these acts from the respondent, converting for their own use or taking profits from and enriching themselves with the proceeds of sales of the respondent's goods. The appellants were also said to have failed to account to the respondent the money that the appellants had received in carrying out the respondent's business with the third party.

[8] The second platform of the respondent's claim goes in this way, that is, after their suspension, the appellants were alleged to have been involved in a business similar to the business run by the respondent when they became shareholders in a company known as F7 Auto Parts Sdn Bhd ('F7') which was

incorporated on 20 May 2011 without disclosing their involvement to the respondent. In the event, the respondent averred that the appellants had failed to act bona fide and honestly, made profit out of the trust placed on him by the respondent, committed an unlawful use of the respondent's money, placed themselves whereby their personal interest was in conflict with that of their duties to the respondent, and acted for their own benefit and that of the third party namely F7 to the detriment of the respondent. The respondent had also claimed that the appellant was involved in fraudulent scheme, acted dishonestly and in breach of their fiduciary duty when they had concealed from the respondent's board the fact that they had misused the respondent's money, carried out business through F7 in the backyard of the respondent's premises similar to and in competition with the respondent with the name of F7 resembling that of the respondent and had made use of confidential information belonging to the respondent for their own and F7's purpose and benefit.

[9] Premised on the above circumstances and background, the respondent claimed for the following reliefs:

(a) payment of the sum of RM1,237,555 by the appellant;

(b) damages for breach of fiduciary duty and/or breach of trust;

(c) damages for breach of misuse of the respondent's confidential information and secret;

(d) interest and costs; and

(e) any other relief which is appropriate and expedient which the court may order.

DEFENCE

[10] It was the appellants' defence that PW6 and his wife Lau Kiat Hoon who were both directors of the respondent had full control over the business directions and activities and financial matters of the respondent. While admitting that they were each paid a salary of RM7,000 every month, the appellants pleaded that PW6 was also paid the same monthly salary. It was also the appellants' defence that all commercial documents and accounting records of the respondent were submitted to PW6 through PW5 and that all cheques were signed by PW6. The scope of work of the appellants involved sales and delivery of goods to the respondent's clients and collection of payments for such sales which they handed over to the respondent. The appellants however did not have care and control on goods and inventory records which were under the control of other employees of the respondent. They denied owing a

fiduciary duty and duty of trust and confidence to the respondent. As employees, the appellants only owed a duty to act in good faith and of fidelity. Additionally they were not the only ones who transacted sales, as the other employees of the respondent were also involved in the sales of the respondent's goods. The appellants had also denied committing various unlawful acts alleged by the respondent and in fact were not prosecuted for any of these acts.

DECISION OF THE HIGH COURT

[11] The learned judicial commissioner below delivered the decision on 14 December 2012 providing grounds with manifest brevity wherein His Lordship had ordered the appellants to pay the respondent:

(a) RM661,566 being the amount for the cash sales of the goods belonging to the respondent;

(b) RM335,700 being the value of the 746 missing used engines belonging to the respondent;

(c) RM130,400 being the amount not remitted to the respondent for the sales of catalytic converters;

(d) a token sum of RM10,000 being damages for the appellant's breach of fiduciary duty and breach of trust even though the same had not been proven; and

(e) interest and cost to the respondent.

[12] We pause to observe at this point that no detailed grounds of the decision had been provided subsequently, not even when this appeal was heard before this court. In his judgment however, the learned judicial commissioner found that the appellants were employed by the respondent and were responsible for the day to day running of the respondent including matters relating to finance. Both the appellants owed fiduciary duties to the respondent. It was also found that the 746 used engines were missing and the appellants had failed to account for it. There was clear evidence of the purchase of catalytic converters by Somdini Trading Sdn Bhd and the sum of RM130,400 was paid but not credited to the respondent's account. The appellants had full knowledge of it. As regards the cash sales, the learned judicial commissioner found that the sum of RM661,566 was missing and not credited to the respondent's account. The appellants having control over the fund, failed to account for it.

[13] The learned judicial commissioner however had found in respect of the second part of the claim, that there was no clear evidence that the appellants had used confidential information which belonged to the respondent. His Lordship had also held that there was no law which prohibited the appellant

from carrying out the exact same business of the respondent except if the appellant had used the confidential information which belonged to the respondent.

THE APPEAL

[14] The appellants appealed. In our view the appeal turned upon a pure question of fact involving the following core issues for our determination:

(a) whether the appellants were liable to pay the sum of RM661,566 to the respondent being the amount for the cash sales of the goods belonging to the respondents;

(b) whether the appellants were liable to pay the respondent the sum of RM335,700 being the value of the 746 missing used engines belonging to the respondent; and

(c) whether the appellants were liable to pay RM130,400 being the amount not remitted to the respondent for the sales of catalytic converters.

It might also be necessary to mention that the respondent did not appeal against the dismissal of the second part of its claim in connection with the alleged appellants' involvement in the business of F7 and a breach of confidential information.

LAW

[15] Quite clearly, the respondent in this action is making a proprietary claim to the proceeds of sales of the respondent's assets and for the value of the 746 missing used engines as well as for damages consequent upon the appellants' alleged breach of fiduciary duty and trust. The respondent is also claiming for the recovery of money based on money had and received by the appellants, and damages in compensation for the tort of conversion brought about by the appellants' alleged unlawful interference with the respondent's rights of property.

[16] We wish to express our understanding of the law. We apprehend that as regards a breach of trust and breach of fiduciary duty in the context of an employee and employer relationship, where the employee's contract involves receipt of the employer's property, notwithstanding whether the property consists of tangible assets or confidential information, a fiduciary obligation exists (see *Attorney General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268). This obligation would in our view concern with the employee's duty to look after the employer's interest, the duty of fidelity towards the principal and the duty to act in good faith, not to make a profit out of the trust, not to place himself in a position where his duty and his interest may conflict and not

to act for his own benefit or for the benefit of a third person without the informed consent of his principal.Who is a fiduciary in law is defined by Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at p 11 as follows:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which gives rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.

[17] On the subject concerning conversion, it is incumbent upon the respondent who is suing in conversion to show that it has an immediate right to possession at law to the property (see *Union Transport Finance Ltd v British Car Auctions Ltd* [1978] 2 All ER 385).

[18] While we are still on the issue of burden of proof, we need only say on this aspect that on the whole, it is beyond question that the respondent bears the legal burden of establishing the facts pleaded against the appellants under s 101 of the Evidence Act 1950 in order to succeed in its claims against the appellants.

THE CASH SALES OF RM661,566

[19] We now turn to the first core question that had been pressed on us in this appeal that is the cash sales of RM661,566 which the learned judicial commissioner had found to be missing and not accounted for by the appellants. The respondent relied on the evidence of PW5 namely Evelyn Kit Wei Yen, the group accounts manager of Sungei Sendok Holdings Sdn Bhd the holding company of the respondent to prove the alleged missing RM661,566. What could be discerned from her testimony was that the respondent's management accounts were prepared by the accounts assistant of the respondent. It would then be submitted to her department after which PW5's staff would verify with the amounts credited into the respondent's bank account.

[20] In May 2011, following the suspension of the appellants and the respondent's employers, PW5 carried out the internal audit of the sales of the respondent's goods and proceeds from such sales whereby it was discovered that the sales of a variety of goods amounting to RM661,566 were unaccounted for. It is significant to mention however that PW5 never explained how did she arrive at the figure of RM661,566. When the alleged missing sum was being vehemently disputed, it would be apposite to be reminded of what this entailed in assessing the sufficiency of PW5's testimony to prove the respondent's claim.

In our view, PW5's evidence without more, would not suffice in order to prove the respondent's case against the appellants.

[21] It is patently obvious that there were no other witnesses called to testify including the accounts assistant of the respondent namely Lim Mei Ching and Lee Yang Fong and other employees who were involved in sales and collection of the proceeds of such sales namely Lim Kim Leong, Tan Chee Guan, Cheong Chin Leong and Gwee Chern Jia that could lend credence to PW5's testimony. These were the respondent's employees who could give a narration of events that might support PW5's evidence that the sum of RM661,566 was missing and that the appellants had misapplied the proceeds of the sales received and that the respondent's accounting and bank records did not show any receipt of payment by it. Thus the respondent only had the words of PW5 to prove its case against the appellants. PW5 was not the staff of the respondent. Her evidence we should say, was nothing but a mere general statement on the alleged missing RM661,566. She just mouthed generalities bereft of any particulars and details and lacking in any evidence which if it was available could justify this court in coming to an irresistible conclusion that the alleged missing sum could be traced to both the appellants. Thus it was little wonder that when PW6 lodged a police report on 2 June 2011, he did not put any blame on the appellants for the alleged loss of RM661,566 and the appellants were never charged in court for any specific or particular offence.

[22] PW1 RM Thiruvarasu who was the executive officer of CIMB Bank Bandar Setia Alam had additionally testified that there was no report of wrongful withdrawals of money from the respondent's account with the bank lodged with the police involving the appellants.

[23] PW5, we observed had also referred to various cash sale receipts which were tendered as exhs P22 and P23. However no evidence was adduced by the respondent to show, if there were indeed any payments made at the respondent's office, to whom were such payments made and by whom were the cash sale receipts issued and signed. It is also pertinent to ask whether the appellants handled these sales transactions and whether the money was deposited into the respondent's account or the money from these cash transactions was indeed missing. The respondent moreover had failed to show the total sales record since the commencement of business in May 2009 until the suspension of the respondent's business on 18 May 2011, the total collection, the total amount not collected and the amount not deposited during the same period. In the absence of this material evidence, we were clueless about how PW5 arrived at this figure which she claimed as the sum that

was missing. Save for these documents and the evidence of PW5, the respondent did not go any further to prove its case against the appellants.

[24] In our judgment, it was necessary for the respondent to call its customers to testify that the purchases were made by them, the goods were delivered and the payments were made either in cash or by cheques to the appellants. We might expect in this regard that, as the respondent had in its statement of claim clearly stated that every customer it had contacted had informed that they had made payments to the appellants, it had become all the more necessary to call them to testify. Yet none of these customers had been called as witnesses.

[25] Lastly, we should say that based on the pleading and the evidence, the appellants had been accused of committing fraud, acts of swindling, conversion, misappropriation of the respondent's money which were actually bordering on criminal conduct. These allegations against the appellants were very serious indeed. But we had listened to this argument, strongly pressed by learned counsel for the appellants, in which, as we understood it and we thought that he was right on this point, that viewed objectively, PW5's testimony and the documentary evidence failed to prove positively that these sales transactions could be linked to the appellants and that the appellants were the recipients of the respondent's money. On a critical evaluation of the evidence in its entirety, we were satisfied that the respondent, on balance of probabilities, had failed to prove that the appellants were responsible for causing the loss of the sum of RM661,566 or had misappropriated for or converted the said sum to their own use. With respect, the learned judicial commissioner had misdirected himself in this fundamental aspect when he found the appellants liable when such finding was against the weight of evidence.

THE SALE OF CATALYTIC CONVERTERS AND THE MISSING RM130,400

[26] This allegation against the appellants had seen the respondent adducing evidence through PW2 one Robin Goh Siow Tong, a director of Somdini Trading Sdn Bhd ('Somdini') to the effect that Somdini had purchased catalytic converters from the respondent for which payment in the sum of RM130,400 being the price for the purchase had been made by him to Wong Kok Keong ('Wong'). It was a cash sale as evident by exh P1. We would observe on this point that PW2 is an independent and neutral witness. According to PW2, PW6 was aware of the purchase as Wong took him to see PW6 regarding the purchase in connection with exh P1 before he made the said purchase. Further in his evidence, PW2 said that PW6 told him he could deal with Wong. Thus when PW2 had made the order for the catalytic converters, Wong

subsequently asked PW2 to collect the goods from the factory. PW2 paid the amount of RM130,400 to Wong on the latter's instruction, not to any of the appellants. The first appellant was also present when the payment was made. Based on this evidence, we came to the inevitable finding that from the outset the purchase in question was made with PW6 fully aware of the transaction.

[27] The essential point is that the appellants did not transact this deal with PW2. There was absolutely no evidence to show that it was the appellants who issued exh P1. PW2 admitted that he signed the exhibit on the bottom right hand corner of the document. However, the respondent did not lead any evidence to show the other signatory to, and the person who prepared, this document.

[28] The evidence of PW2 also revealed that he had lunch and dinner with PW6 and Wong and the topic of discussion was always on the sale of catalytic converters. PW2 was clearly under the impression that Wong was authorised by PW6 to deal with him. Every time he went to take delivery of the goods Wong would be at the factory and in fact supervised the loading of the goods onto the lorry.

[29] In fact, during cross-examination, PW2 even said that Wong told him that he and PW6 were partners. The evidence of PW2 showed that PW6 and Wong were the two major players directing the sales of catalytic converters belonging to the respondent, not the appellants. Unfortunately for the respondent, Wong walked away with the money. The respondent could not prove that it was the appellants who wrongfully took the money. In the upshot, there was no evidence to connect the missing money with both the appellants. For the foregoing reasons, with deference to the learned judicial commissioner, we came to the conclusion that His Lordship had fallen into error in misapprehending the law and the evidence in ordering the appellants to pay RM130,400 to the respondent. When it was so clear that the money had been paid to Wong and he had surreptitiously taken it, in our judgment it would be wrong for liability to be pinned on innocent persons such as the appellants for the loss of the money. It must be shown that the appellants had taken the money and had withheld or misapplied it (*Beeches Workingmen's Club and Institute Trustees v Scott* [1969] 2 All ER 420). It is perhaps noteworthy to mention that PW2 was called by the respondent to testify on its behalf in the course of which his evidence we found, had completely negated the respondent's case against the appellants on this allegation. In our judgment this claim is patently false.

THE MISSING 746 USED ENGINES

[30] The claim for the missing used engines came about following the stocktaking of the respondent's stock carried out by PW3 namely Yong Chin Jiang, the accounts executive of Sungei Sendok Holdings Sdn Bhd upon instruction by PW5, when it was discovered that a total of 746 used engines were missing from the respondent's factory. The stocktaking exercise was carried out by a method of tagging which Sungei Sendok Holdings Sdn Bhd wanted to implement on the respondent by putting in place a new tracking system called Radio Frequency Inventory System. By this system, according to PW3, a sticker with a bar code would be placed on each engine physically. PW3 would then scan the tags into the system to obtain the existing physical stock. A cross-check of the engine and tag matching table ('1D10') which PW3 described as physical tagging work sheet in his witness statement, against the inventory physical worksheet ('1D9') was carried out and it was found that 746 used engines in total were not accounted for. According to PW3, 1D9 was provided by the respondent's accounts clerk namely Joanne Lee. The stocktaking exercise commenced in July 2010 and was completed on 14 October 2010.

[31] The record of proceedings would show that the respondent relied on the evidence of PW3 and PW5, documentary exhibits of P6, P18, P21 as well as 1D8, 9 and 10 to prove its case against the appellants on this issue.

[32] In his evidence PW3 testified that the 746 used engines were not in the yard and therefore that would mean the engines were missing. It would seem clear that PW3 in this regard was merely making an assumption. PW3 referred to 1D9 which he compared with 1D10 and concluded that 746 engines were missing. However the persons involved in the stocktaking exercise had never seen the physical presence or existence of the missing engines in the factory in the first place. The respondent sought to prove the existence of these engines by comparing 1D9 and 1D10 and claimed that the engines existed and were subsequently missing. But Joanne Lee who gave 1D9 to PW3 and the maker of 1D9 were not called to testify. Thus on what basis 1D9 was prepared, whether it was based on the actual number of engines in existence in the respondent's inventory, whether Joanne Lee and other respondent's employees including the appellants had seen it were never in evidence at all. As a result, we were in no position to say conclusively that the engines listed in 1D9 were indeed in existence when 1D9 was prepared. Neither could we determine whether the appellants were responsible for the missing engines.

[33] In any event, for reasons best known to the respondent, both 1D9 and 1D10 were not tendered as exhibits and as such these documents could not be considered as evidence in order to prove the respondent's claim against the

appellants. It is manifestly clear that the respondent's reliance on these documents to prove the existence of the 746 missing used engines before its alleged disposal in our judgment was completely of no assistance to its case.

[34] However, the respondent's case was not based on 1D9 and 1D10 alone. It had produced other documents one of which was 1D8 which was the revised unfound engines after stock take produced through PW3. Unfortunately, the respondent in the course of the trial encountered another problem when PW3, in his evidence during cross-examination, while stating that he prepared 1D8 and gave it to PW5, admitted that 1D8 was wrong. It was in evidence that there was a review of the stocktaking exercise. 1D8 was in fact the revised list after the stocktaking exercise was reviewed. What PW3 did was that he changed the heading without further checking the 'ingredient', so he admitted that he might have made a mistake.

[35] Having said that, we digress at this point from our deliberation on 1D8 to consider the next documentary exhibit. We shall return to 1D8 in due course. Exhibit P6 was prepared by PW3. It contained the list of 'Unfound Engines After Stock Take' showing the total number of 1473 engines. After it was revised following the review of the stocktaking exercise, exh P7 which was the 'Revised Unfound Engines After Stock Take', was prepared. The last page of exh P7 showed that the additional engines sold were 724 engines. Exhibit P7 therefore was not the revised list of unfound engines. On the contrary, it was actually the list of the additional engines sold. Thus taking into account exhs P7 and P6, the difference between the total number of unfound engines in exh P6 and the number of additional engines sold in exh P7 was 749 engines and after excluding three engines which according to PW3 were used by the appellants, the balance of 746 engines were in fact the total number of engines missing was from the respondent's inventory. PW3 admitted that based on exh P6 the number of unfound engines was 1473 engines. However when he prepared the revised list in exh P7 the final number of missing engines stood at 746 engines.

[36] Now reverting to 1D8, the respondent through its counsel in the course of hearing finally informed the court that 1D8 was actually similar to exh P7 as such it was replaced with exh P18 as the list of the 746 unfound engines.

[37] The respondent subsequently produced exh P21 as a list of 'Unfound Engines After Update' for the said 746 missing engines. We however found exhs P18 and P21 to contain different models for the missing engines. While exh P18 contained models which were substantially Toyota, 346 engines in total, none of these models were found listed in exh P21 though other models such as Mazda, Volvo, Daihatsu, Mitsubishi, Subaru, Mercedes Benz, BMW, Honda, Isuzu, Nissan were listed in both exhibits. The glaring similarity was

only in terms of the total number of the unfound engines which was 746 engines. There was no explanation which was forthcoming from the respondent that could explain these discrepancies.

[38] A pertinent question could therefore be asked. Could these Toyota engines be in exh P7? We found on the contrary that there was only one unit of Toyota engine in exh P7 which as earlier-mentioned, contained the list of the used engines sold. It follows therefore that the Toyota engines could be among the 746 engines which had been allegedly taken and sold by the appellants. However the updated missing engines list in exh P21 did not contain the Toyota engines. A further question might be asked on whether there could be mistakes in describing these engines in exh P18 and consequently it was corrected in exh P21. However these engines we observed, had its own distinctive features in that serial numbers were stated for each engine in both exhs P18 and P21 therefore mistakes could be ruled out. These unexplained discrepancies had inevitably cast serious doubt in the respondent's case against the appellants and made the stocktaking exercise faulty and unreliable. It would therefore, in our view, be extremely unsafe to rely on these exhibits.

[39] The respondent had also relied on exhs P22 and P23 the cash sales documents showing the record of sales to prove that the appellants had sold the 746 missing engines. There were all together 325 cash sales documents. These documents showed various sales including car spare parts such as sport rims, gear box, fuse boxes, air-conditioned pumps, starters etc. Were these documents proofs of the sales of the engines? Surely we could not assume that in view of the sales of the spare parts, these documents were proof of sales of the 746 missing used engines. PW6 said that the engines were worth RM335,700. How PW6 arrived at the figure was not in evidence. Was the total amount of sales worth RM335,700 as claimed? The respondent did not lead evidence in this regard. Consequently in our view, this is sheer speculation. We could not hazard the total sum was RM335,700. In any event, it would be noted that exhs P22 and P23 were also relied on by the respondent to prove that the sum of RM661,566 which we have deliberated earlier in the first issue, was missing. In our opinion, it is not enough to produce these documents, the respondent had to prove it. The respondent had to show that the total amount of sales based on exh P21 was worth the combined sums of RM335,700 and RM661,566. This, the respondent had failed to do.

[40] Further, only PW3 and PW5 from the stocktaking team testified. But they were not the respondent's employees, they instead worked in the accounting department in Sungei Sendok Holdings Sdn Bhd. These witnesses

obviously did not have direct knowledge as they did not deal physically with the 746 missing used engines and had never seen it. Moreover none of the employees working with the respondent was called to testify on the existence of the said engines.

[41] It is manifest that the respondent's case of the missing engines was premised on the assumption that since it was not found in the respondent's factory during the stocktaking exercise and by comparing exhs P6, P7, P18 and P21, it could be said that the engines were missing. This could be gleaned from the evidence given during the trial in the court below which we have already dealt with in our foregoing discussion above. It was in evidence that the respondent commenced business in May 2009. Whether these engines were imported and thus existed was never established by the respondent. In fact, the respondents did not adduce any evidence on the actual number of used engines purchased by it for resale. The evidence was crucial to the respondent's case as it would show full particulars and documentary records of the actual purchase by way of an import and sale of the used engines. Witnesses who handled shipping and import documents such as customs declaration forms as well as the inventory and sales in the factory could have been called to testify. These were individuals who could be material witnesses.

[42] There was therefore the problem of identification of these engines and indeed more importantly the question of the existence and whereabouts of the same which remained shrouded in mystery.

[43] Needless to say, our careful analysis of the evidence had exposed the trail of failures by the respondent to call these material witnesses and such manifest failure in our view would attract the presumption of adverse inference under s 114 illustration (g) of the Evidence Act 1950 against it. It is trite law and, indeed, a fundamental tenet of the rule of law that whoever alleges facts must produce the necessary evidence in proof of such facts (see *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627).

[44] The court may presume that evidence which could be produced and is not produced would if produced be unfavourable to the person who withholds it. We are mindful of the fact that such evidence must be material one in order for the adverse inference can be invoked. The scope of s 114 illustration (g) is not just restricted to the non-production of material witnesses. It also extends to non-production of material documentary evidence. Edgar Joseph Jr in *Public Prosecutor v Chee Kon Fatt* [1991] 3 CLJ 2564 at p 2565 referred to the Privy Council case of *Seneviratne v R* [1936] 3 All ER 36 where Lord Roche

said:

> Witnesses essential to the unfolding of the narrative upon which the prosecution case is based must, of course, be called by the prosecution whether in the result the effect of their testimony is for or against the prosecutions.

We would also refer to the dictum of His Lordship Mohamed Azmi SCJ in *Munusamy v Public Prosecutor* reported in [1987] 1 MLJ 492 at p 493, on the ambit of s 114(g) of the Evidence Act 1950 and we quote:

> It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[45] As earlier stated, the respondent on this aspect bears the legal burden of establishing the facts pleaded against the appellants under s 114 of the Evidence Act 1950. In our judgment, to pin liability on the appellants, the respondent bears the burden of proving the existence of the 746 used engines and its whereabouts before it went missing and secondly the appellants had sold the said engines and misappropriated the proceeds of such sales as pleaded by the respondent.

[46] The evidence adduced by the respondent in our view did not point to dissipation of the 746 used engines by the appellants. There was no contemporaneous documents and oral evidence which showed that it was the appellants who took or were entrusted with these engines for their own or third party's use and benefit. Each engine according to PW5 was heavy and big weighing between 200–250kg. A forklift and lorry were required to take just one engine from the factory. To take all the 746 engines in one single act would require ten containers, and if one engine was taken out per day, it would take more than two years to take out all the 746 engines, a period longer than the period of business of the respondent which commenced on 13 May 2009 and was suspended on 18 May 2011. However who was responsible for causing the engines to disappear and how did it occur in the first place were unknown. Notwithstanding that, we did not find any cogent and tangible evidence to show the appellants' had a hand in the alleged unlawful act.

[47] The apparent lack of evidence had thrown the respondent's case into the realm of speculation to say that the 746 used engines existed. The respondent we should say, could not claim that the 746 used engines belonged to it, and it was missing because the appellants being the persons responsible must have disposed of the same. Under the circumstances, we were satisfied that, based on the material before us, there was the manifest lack of evidence to show that the

appellants had stolen, taken, misappropriated and sold these engines and had converted for their own use and kept with them the proceeds of the sale and various other unlawful acts in the manner it was pleaded in the statement of claim.

FIDUCIARY DUTY

[48] Before leaving this case, there remains the question whether the appellants had breached their fiduciary duty which the appellants were said to have owed the respondent. The respondent's claim was premised on a breach of fiduciary duty by the appellants. The question had arisen in consequence whether the appellants owed any such duty to the respondent in the first place. This duty was said to arise because according to the respondent, the appellants were its employers in charge of day to day management, operations and administration of the respondent and the contract of employment involved receipt of the respondent's property. In gist, it was the respondent's case that the appellants had breached their fiduciary duty which breach had caused the respondent to suffer losses. In law, there can be no doubt that a fiduciary obligation arises in a situation where an employee's contract involves receipt of the employer's property as is in the appellants' case. The learned judicial commissioner had found and we think correctly, that the appellants owed a fiduciary duty to the respondent. However, we think that the finding of liability by His Lordship could not be countenanced as it was against the weight of evidence. The alleged breach was clearly related to the missing money and assets of the respondent that is the 746 used engines. We have found that the respondent had failed to prove that the appellants were liable in the sense it was pleaded in the statement of claim. In the event, it is our judgment that the respondent had also failed to establish that the appellants had breached their fiduciary duty to the respondent.

CONCLUSION

[49] In all the circumstances and for the reasons discussed, we found that the respondent's action under consideration in this appeal was wholly unmeritorious and this case undoubtedly deserved our appellate intervention. Our critical evaluation of the evidence oral and documentary would plainly show that the respondent had failed to prove a case on the balance of probabilities against the appellants. In the premises, we allowed the appeal and set aside the order of the learned judicial commissioner. We ordered costs of RM15,000 to be paid by the respondent and the deposit to be refunded to the appellants.

Appeal allowed and order of learned judicial commissioner set aside with costs of RM15,000

Reported by Dzulqarnain Ab Fatar